

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32**

(Oakland, CA)

CALIFORNIA WASTE SOLUTIONS, INC.

Employer¹

and

Case 32-RC-5304

MACHINISTS DISTRICT LODGE 190,
LOCAL LODGE 1546²

Petitioner

DECISION AND ORDER

California Waste Solutions, Inc., herein called the Employer, is in the business of recycling various materials including plastics, paper, aluminum, and glass at its various locations in the San Francisco Bay Area. The Employer's facilities involved in the present matter are located at 1820 10th Street in Oakland, California ("10th Street facility"), 3300 Wood Street in Oakland, California ("Wood Street facility"), and at the Port of Oakland ("Port facility"). Machinists District Lodge 190, Local Lodge 1546, herein called the Petitioner or the Union, filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent a unit of all full-time and regular part-time foreman operators employed by the Employer; excluding all other employees, guards, and supervisors as defined by the Act. A hearing officer of the Board held a hearing, the Employer filed a post-hearing brief with me, and the parties presented oral arguments at the conclusion of the hearing, all of which I have duly considered.

¹ The name of the Employer appears as amended at the hearing.

² The name of the Petitioner appears as amended at the hearing.

The primary issue here is whether the unit of foremen sought by the Petitioner is appropriate for collective bargaining, or whether, as the Employer contends, the foremen are statutory supervisors under Section 2(11) of the Act.³ Alternatively, the Employer contends that in the event the foremen are found not to be statutory supervisors: 1) the foremen would properly be included in a bargaining unit already represented by Warehousemen's Union Local 6, International Longshoremen's and Warehousemen's Union ("Local 6"), as the foremen perform largely the same functions as the employees covered under the current collective bargaining agreement between the Employer and Local 6; 2) the Local 6 collective bargaining agreement would therefore be a bar to the present petition; 3) even if the foremen need not be included in the Local 6 unit, the foremen unit should be limited to the 10th Street facility.⁴ Conversely, the Petitioner asserts that the foremen do not exercise supervisory functions and do not exercise independent judgment in the course of any of their arguably supervisory functions. Petitioner also takes the position that the foremen warrant representation in a separate multi-facility unit and need not be included in the Local 6 unit.

For the reasons noted below, I find that the foremen/operators constitute supervisors within the meaning of Section 2(11) of the Act, and I therefore must conclude that the foremen cannot be included in an appropriate unit, and that the petition should be dismissed. Given my finding that the foremen are supervisors, I do not, and need not address the Employer's previously referenced alternative appropriate unit and contract bar contentions.

³ At present, the five foremen are Mauricio Romero (also known as Mauricio Hernandez), Santos Valladares, Santos Quintanilla, Javier Guerrero, and Luis Garcia.

⁴ As stated on the record by the hearing officer, the Region gave Local 6 advance notice of the petition and hearing in this case. Local 6 informed the hearing officer that it did not wish to intervene and that if it did attend the hearing, it would only be to offer evidence of the collective bargaining history of its bargaining unit. Local 6 did not attend the hearing.

OVERVIEW OF THE EMPLOYER'S OPERATIONS

The Employer is a recycling service that receives, sorts, cleans and bales recyclable materials, such as plastics, paper, cardboard, aluminum, tin and glass, and sells those materials to private companies for processing. The Employer's 10th Street and Wood Street facilities process all of the above-described recyclable materials whereas the Port facility processes glass only. There is a pre-sort line, a sort line, and a baling line. Approximately 60 to 80 employees work at the 10th Street facility, approximately 68 to 80 employees work at the Wood Street facility, and 4 to 5 employees work at the Port facility.

Until about four to six months before the hearing in this matter,⁵ the 10th Street and Wood Street facilities were run jointly. During that time, Michael Duong was the Plant Manager or Operations Manager at 10th Street, Douglas Duong was the Plant Manager or Operations Manager at Wood Street, and Clayton "Jay" Collins was the Assistant Manager at both the 10th Street and Wood Street facilities. However, about four to six months before the hearing, Collins was promoted from Assistant Manager at both facilities to Plant Manager at the 10th Street facility, Douglas Duong remained Plant Manager at the Wood Street facility, with Michael Duong overseeing both facilities as well as the Port facility. There is no longer an Assistant Manager at any of the pertinent facilities.

Reporting directly to Plant Manager Douglas Duong at the Wood Street facility are first shift foreman Mauricio Romero and second shift foreman Santos Quintanilla.⁶ Reporting to Plant Manager Clayton Collins at the 10th Street facility are first shift foreman Luis Garcia and

⁵ The exact date is not contained in the record.

⁶ Quintanilla recently transferred from the 10th Street facility, where he worked before coming to Wood Street. Correspondingly, the bulk of the testimony provided by Quintanilla related to his experiences at 10th Street rather than Wood Street.

second shift foreman Javier Guerrero, and Port of Oakland foreman Santos Valladares.⁷ While Collins directly supervises Port foreman Valladares, Collins does not spend any portion of his day at the Port, and Valladares is the Employer's highest ranking personnel at that facility. Moreover, at the 10th Street facility, the foremen are the Employer's highest-ranking personnel present during the periods from 5:30 a.m. to 10:00 a.m. and 9:00 to 11:00 p.m., when Collins is not present.

Each of the three facilities has two shifts. The first shift at 10th Street is from 5:30 a.m. to an unspecified time during the afternoon. The second shift at 10th Street is from 2:30 p.m. to 11:00 p.m..⁸ With minor exceptions not pertinent here, the work performed during the two shifts is virtually identical. Trucks dump recyclable goods on the tipping floor, a tractor pushes the materials into a conveyor, which then feeds the materials to various sort lines and conveyor belts where the different types of materials are separated by sorters. After sorting, each type of material is put into large bales which are taken to cleaning areas to be prepared for sale and shipping.

Among the job classifications at the 10th Street facility are forklift drivers, tractor drivers, baler machine operators, cardboard sorters, plastic sorters, plastic/glass/paper sorters, mix paper sorters, and newspaper sorters. The classifications at the Wood Street facility include the classifications at the 10th Street facility, plus the following classifications: maintenance cleaner, baler machine conveyor cleaner, baler cleaner, main conveyor workers, and maintenance workers. All of the above-referenced production employees at the facilities, except for the five foremen, are part of a bargaining unit covered by a collective bargaining agreement between the

⁷ Valladares recently transferred from the 10th Street facility, where he worked before coming to the Port facility.

⁸ While the record does not reflect the exact first shift start and end times for the Wood Street facility, Quintanilla testified he worked the same second shift of 2:30 p.m. to 11:00 p.m. at both the 10th Street and Wood Street facilities. In any event, there is no apparent contention that the shift times differ between the facilities or that any such difference would be material.

Employer and Local 6.⁹ All of the above-referenced mechanics/maintenance employees at the facilities, who are regularly stationed at 10th Street but occasionally work at Wood Street, are covered by a collective bargaining agreement between the Petitioner and the Employer.

OVERVIEW OF THE FOREMAN POSITION

All of the foremen at issue in this case were promoted from the ranks of regular non-supervisory employees covered under a preexisting collective bargaining agreement between the Employer and Local 6. Upon their promotion, they were no longer covered by the collective bargaining agreement. The foremen describe themselves as in charge of their respective facilities and received substantial raises upon being promoted to foreman. Both rank and file employees and “leads,” who earn one dollar more per hour than rank and file employees, report directly to foremen. Collins, a plant manager who supervises the foremen at the 10th Street and Port facilities, and who had been the assistant operations manager at the Wood Street facility earlier this year, testified without contradiction that the foremen at the 10th Street facility have the same authority as those at the Wood Street facility. There is no evidence indicating that the foremen at the Port facility, also supervised by Collins, have any less authority than the other foremen.

The record shows that the foremen have a variety of duties. The first shift foreman opens the facility gate each morning so that trucks may enter the yard and deliver their recyclable goods. In addition to the disciplinary and promotional powers discussed more fully below, foremen engage in some assignment and responsible direction of work.¹⁰ As an illustration,

⁹ The record contains uncontested testimony from foreman Santos Quintanilla indicating that each of the five present foremen was formerly a member of the Local 6 bargaining unit before being made foremen. As to one of the five foremen, there is also undisputed testimony from Plant Manager Collins that foreman Luis Garcia was a Local 6 unit member before being made a foreman. Garcia was not called to testify.

¹⁰ I also note that at least two of the five present foremen have prepared written performance evaluations of employees, which are in the record. Although it appears that one of these evaluations may have led to an employee

there was testimony that foreman Santos Valladares, while serving as foreman at the Wood Street facility, observed an unnamed employee on the sort line who suffered from poor productivity and about whom co-workers had complained. Valladares apparently made the determination to switch this employee from the sort line to the baler line so that Valladares could more closely monitor his work. While Collins could not specifically recall whether Valladares consulted with Collins as to the reassignment of this employee, there is no evidence that Collins or any other higher level supervisor conducted any independent investigation prior to this change in job assignments of the affected employee. As a further illustration, foreman Santos Quintanilla testified that he assigns employees to work in various locations and/or to perform various tasks during situations in which the system shuts down as a result of the conveyors being full and needs to be cleared out before it can be restarted. He also occasionally directs the employees to clean up the area near where they are working.¹¹

The foremen regularly walk throughout their respective facilities, inspect equipment, employees and production generally, give employees orders and instructions, and order equipment and supplies for the employees' use. The foremen can grant time off to employees who are ill without checking with higher level supervisors, recommend the granting of overtime for employees, handle employee concerns about timecards, supplies or equipment, and attend foreman/management meetings at which production, safety and other company concerns are discussed.

being demoted, the evidence on the use of these evaluations is insufficiently clear to base a finding of supervisory status.

¹¹ There is insufficient evidence to support the Employer's position that the foremen should be found to be statutory supervisors based on the power to assign work, the power to responsibly direct work, the power to adjust employee grievances, the power to grant time off or the power to recommend overtime. With regard to each of these indicia there is some evidence supporting the Employer's position, but I conclude that that evidence as to each individual indicia is insufficient to establish that the foremen exercise this authority with sufficient frequency and with the level of discretion necessary to establish supervisory authority.

THE POSITIONS OF THE PARTIES

The Petitioner seeks to represent a unit comprised solely of the foremen/operators, contending that the foremen do not exercise supervisory authority and do not exercise independent judgment in connection with any arguably supervisory authority they exercise. Conversely, the Employer argues that the foremen are statutory supervisors, because they possess the authority to assign and direct work, to discipline employees, to evaluate employee performance, to effectively recommend the promotion of employees, to grant time off, to effectively recommend overtime, and to address and resolve employee problems and grievances. The Employer also contends that certain secondary indicia of supervisory authority support the conclusion that the foremen are statutory supervisors in this case. As set forth in greater detail below, I conclude that the foremen are statutory supervisors on the basis of their exercise of independent judgment in the course of disciplining employees and effectively recommending the discipline and promotion of employees.

ANALYSIS

The Applicable Law

Section 2(11) of the Act defines a supervisor as one who possesses “authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.” The possession of any one of these primary indicia of supervisory authority, as specified in Section 2(11) of the Act, regardless of the frequency of their use, is sufficient to establish supervisory status, provided that such authority is exercised in the employer's interest,

and requires independent judgment in a manner that is more than routine or clerical. Harborside Healthcare, Inc., 330 NLRB 1334 (2000); Hydro Conduit Corp., 254 NLRB 433, 437 (1981); Queen Mary, 317 NLRB 1303 (1995).

The party asserting that individuals are supervisors under the Act bears the burden of proving their supervisory status. NLRB v. Kentucky River Community Care, 532 U.S. 706, 121 S.Ct. 1861 (2001); Bennett Industries, Inc., 313 NLRB 1363 (1994); Tucson Gas and Electric Co., 241 NLRB 181 (1979). To meet this burden the party asserting supervisory status must provide sufficient detailed evidence of the circumstances surrounding the alleged supervisor's decision making process in order to demonstrate that the alleged supervisor was exercising the degree of discretion or independent judgment that is necessary to establish supervisory status. Designation of an individual as a supervisor by title in a job description or other documents is insufficient in and of itself to confer supervisory status. Western Union Telegraph Company, 242 NLRB 825 (1979). On the other hand, possession of authority consistent with any of the indicia of Section 2(11) is sufficient to establish supervisory status, even if this authority has not yet been exercised. See, e.g., Arlington Masonry Supply, Inc., 339 NLRB No. 99, slip op. at 3 n.10 (2003); Pepsi Cola Co., 327 NLRB 1062, 1063 (1999); Fred Meyer Alaska, Inc., 334 NLRB 646, 648 n. 8 (2001). It is the possession of a power, rather than its actual exercise, that is determinative of supervisory status. See Formco, Inc., 245 NLRB 127, 128 n.7 (1979); Redlands Christian Migrant Assn., 250 NLRB 134, 138 (1980).

In this case, it is the Employer who is asserting that the foremen/operators are supervisors, and therefore it has the burden of establishing the supervisory status of these positions. For the reasons set forth below, I find that the Employer has satisfied its burden in this regard. I turn now to the specific indicia.

FOREMEN EFFECTIVELY RECOMMEND THE PROMOTION OF EMPLOYEES TO MANAGEMENT TRAINEES

The record establishes that the Employer established a management training program. Collins instructed the foremen to recommend suitable candidates from among the rank and file employees. In launching the program, Collins did not instruct the foremen as to the criteria they should utilize in the course of suggesting trainee candidates. The employees recommended for the program by the foremen were selected to be management trainees.

To determine that the foremen made effective recommendations for the trainee program, it must be established that the recommended action was taken by the foremen's superiors without independent investigation, not simply that the recommendation is ultimately followed. Children's Farm Home, 324 NLRB 61 (1997); Brown & Root, Inc., 314 NLRB 19, 23 (1994). In the present case, that prerequisite is satisfied. There is no evidence that the Employer has independently investigated the qualifications or suitability of any management trainee candidates suggested by the foremen. Indeed, Collins deferred to the independent judgment of the foremen based on their day to day work experience with the employees, and he testified that the recommendations of foremen as to management trainees were "rubberstamped." The evidence also shows that foreman Quintanilla recommended that the Employer promote employee Javier Campillo to management trainee, and that foreman Valladares recommended that the Employer promote employee (First Name Unknown) Merino to management trainee, and there is no evidence to contradict the Employer's testimony that it accepted these recommendations without having conducted any independent investigation of the candidates.

While being made a management trainee does not qualify the trainees for an immediate raise or increase in benefits, it does have an immediate impact on the trainee's working conditions. The management trainees are taken out of their regular work positions for a portion

of the day so that they can follow the foreman around observing how to perform the foreman position.¹² The foremen then impart their knowledge and thereby enable the management trainees to act as foremen in the event that a foreman is absent.¹³ Moreover, in those situations in which management trainees substitute for absent foremen, the trainees receive the substantially higher foreman's hourly rate of pay for that time. Given the trainees' immediate increase in responsibility, short term prospect of increased pay while substituting for an absent foreman, and the increased likelihood of promotion to the foreman position,¹⁴ I find that the transition from rank and file employee to management trainee constitutes a promotion and that the foremen effectively recommend the promotion of employees to the management trainee position.¹⁵

THE FOREMEN HAVE AUTHORITY TO DISCIPLINE AND EFFECTIVELY RECOMMEND DISCIPLINE OF EMPLOYEES

I also find that the record supports the conclusion that the foremen both discipline and effectively recommend the discipline of employees. The Employer utilizes a progressive discipline system in which the foremen have power to issue verbal warnings, written warnings, suspensions and even terminations. There is no place on the Employer's disciplinary action forms for the signature of the Plant Manager or Assistant Plant Manager. The Employer's witnesses testified without contradiction that the foremen have full authority with respect to discipline, up through termination. The evidence establishes that foreman Javier Guerrero

¹² See K.B.I. Security Services, Inc., 318 NLRB 268 (1995) (finding road supervisor to be a statutory supervisor in part because of his training of assistant road supervisors).

¹³ Quintanilla testified that his handpicked trainee, Campillo, served as foreman in place of Quintanilla during a week in which Quintanilla traveled out of the country.

¹⁴ There are examples of this promotional ladder in the record. Former Local 6 unit employee Luis Garcia was made a management trainee, and subsequently was promoted to his current foreman position.

¹⁵ As noted above, I find that there is insufficient evidence to establish that foremen have the power to evaluate employees generally or that they exercise independent judgment in the course of doing so. Apart from the recommendation of management trainees discussed above, there is no concrete evidence in the record that written performance evaluations prepared by foremen have had any effect on the wages or job status of any employees, the evaluations are rudimentary, containing only a single numerical ranking to be circled for each employee, with no space for the foremen preparers to explain the basis for their respective assessments. See Harborside Healthcare, 330 NLRB 1334 (2000); Beverly Health and Rehabilitation Services, Inc., 335 NLRB No. 54 (2001); Mount Sinai Hospital, 325 NLRB 1136 (1998).

suspended an employee in August 2002 for a “no call, no show”, and there is no evidence that any higher level supervisor conducted any independent investigation of the circumstances before the suspension was implemented. Similarly, Guerrero issued a written warning to an employee in September 2004 for carelessness and violation of safety rules, and Plant Manager Collins, Guerrero’s supervisor, testified that he played no part in Guerrero’s decision to issue the warning to the employee.¹⁶ Further, foreman Santos Valladares issued a written warning to an employee at the 10th Street facility in September 2004 for improper conduct in not assisting fellow employees, and Collins again indicated that Valladares did not need Collins’ approval in order to issue this warning.

Foreman Quintanilla gave testimony that he lacks the authority to impose discipline. I agree with the Employer’s contention, also based on Quintanilla’s testimony, that this belief on Quintanilla’s part stems from Quintanilla’s apparent reluctance to impose discipline, and thereby engender animosity from co-workers, and not from any representation by the Employer that either foremen generally, or Quintanilla specifically, lack the power to discipline employees. Moreover, where a supervisor sometimes or even frequently fails to carry out his assigned supervisory duties, this does not change his employment status from that of a supervisor to that of a rank-and-file employee. K.B.I. Security Services, Inc., 318 NLRB 268, 269 n. 5 (1995); Babcock & Wilcox Construction Co., 288 NLRB 620, 621 n. 3 (1988).^{17 18}

¹⁶ Collins also testified that there were occasions on which Guerrero has terminated employees, although he was unable to recall specific examples. Collins partially attributed his inability to remember to the fact that terminations were the foremen’s concern rather than his.

¹⁷ Foremen Romero and Guerrero did not testify at the hearing and Petitioner made an offer of proof that they would testify that they had not filled out performance evaluations of employees or that they lacked the authority to prepare such performance evaluations. Even assuming that they had testified consistent with Petitioner’s offer of proof, I cannot infer from that bare offer of proof that they would have also denied having the authority to impose or recommend discipline. In this regard, I also note the record evidence of a variety of disciplines imposed by Guerrero.

¹⁸ It is well established that the Regional Director may not make credibility determinations in pre-election representation case proceedings. Whenever evidence is in conflict or otherwise inconclusive on particular indicia of

In finding that foremen possess power to discipline, I give very little weight to the Employer's proffered example of foreman Javier Guerrero suspending two employees for continual lateness. It appears from the record that Guerrero issued such suspensions in response to an order from Collins that any continuously tardy employees were to be suspended, and therefore such suspensions do not reflect a sufficiently significant exercise of independent judgment on Guerrero's part. See Wilshire at Lakewood, 343 NLRB No. 23, slip op. at 3 (2004); Dole Fresh Vegetables, Inc., 339 NLRB 785, 786 (2003).¹⁹

In addition to the power to impose discipline, I also find that the record reflects that the foremen possess the authority to effectively recommend discipline. In the Board's recent decision in Progressive Transportation Services, Inc., 340 NLRB No. 126 (2003), the Board found a deck lead supervisor to be a statutory supervisor based on her authority to effectively recommend discipline. In that case, the evidence showed that the deck lead supervisor's signature appeared on the line designated for supervisor signature on various disciplinary forms, and that these disciplinary notices related to employee tardiness and other acts of employee misconduct, and that the disciplinary notices were a part of the employer's progressive discipline system. Importantly, the Board acknowledged that the deck lead supervisor did not prepare the disciplinary notices independently, and rejected the petitioner's argument that deck lead

supervisory authority, the Board will find that supervisory status has not been established on the basis of those indicia. The Door, 297 NLRB 601 (1990). However, given the existence of other evidence interspersed throughout the testimony from Quintanilla, as well as Quintanilla's obvious and conceded reluctance to impose discipline and his evasive responses to repeated direct questions whether he had authority to discipline, I would be inclined if pressed to credit Collins with respect to Quintanilla's power to discipline. In any event, I find sufficient evidence in the record to demonstrate foremen's authority to impose discipline and effectively recommend the imposition of discipline, even if I put aside and am precluded from resolving this testimonial conflict between Collins and Quintanilla.

¹⁹ In finding that the foremen possess authority to discipline, I also give very little weight to the Employer's proffered examples of the foremen's alleged power to send employees home. First, the evidence is inconsistent or unclear with respect to the power of foremen to send home employees who have caused an accident at work, or who were ill, or whose family members were ill. Second, sending employees home because they are ill or have committed egregious and obvious safety violations are not an indication of the use of the type of independent judgment necessary to establish supervisory authority. Webco Industries, 334 NLRB 608, 610 (2001); Chevron Shipping Company, 317 NLRB 379, 381

supervisor's disciplinary function was merely reportorial, instead finding that the deck lead supervisor exercised independent judgment in the course of assessing which employees and which employee disciplinary issues needed to be brought to the attention of her supervisor, and that the deck lead supervisor effectively initiated the disciplinary process as to those employees whom she chose to report rather than counsel informally. 343 NLRB No. 126, slip op. at 2.²⁰

In the present case, there is evidence that foreman Quintanilla actively participated in the decision to suspend employee Cesar Ayala as a result of two days of "no call-no show" by Ayala during a two week period. While Michael Duong played a role in the preparation of the Employee Disciplinary Report signed by Quintanilla, the evidence is undisputed that it was Quintanilla who made the decision that Ayala's absences were interfering with production and that the matter was worthy of bringing to the attention of Collins and Michael Duong, thus initiating the disciplinary process that culminated in the suspension of Ayala. Quintanilla also participated in the meeting at which it was decided to discipline Ayala. There is no evidence indicating that the foremen are under strict guidelines with regard to what types of conduct must be reported to the plant managers and what problems may be dealt with through non-disciplinary means.

As an additional illustration of a foreman's power to effectively recommend discipline, there was evidence that, in the period shortly before the hearing, Quintanilla observed an unspecified employee operating a forklift or tractor in an unsafe manner, resulting in damage to the vehicle. Quintanilla began the process of preparing a disciplinary notice to that employee before informing supervisor Douglas Duong of the incident the next day. There is no evidence in the record to contradict Duong's testimony that Quintanilla prepared the disciplinary form,

²⁰ See also Formco, Inc., 245 NLRB 127, 129 (1979) (noting that but for initiative of supervisory foreman, misconduct of employees would have gone unnoticed and unpunished).

that Duong and Quintanilla discussed what the disciplinary report should say, and that Quintanilla participated in the decision as to the level of discipline that would be appropriate. Despite Petitioner's arguments to the contrary, the fact that Quintanilla did not impose immediate discipline on the spot does not detract from the conclusion that it was Quintanilla who effectively recommended to Duong that the employee be disciplined. It was Quintanilla that made the determination that the incident warranted Duong's attention, despite the fact that the incident resulted only in damage to the tractor and no injuries to any persons, and it was Quintanilla who thereby initiated the process by which the Employer's progressive discipline system imposed a suspension upon the employee. As the evidence shows that the foremen have the same level of authority, under the holding in Progressive Transportation Systems, *supra*, I conclude that the foremen possess the authority to effectively recommend discipline within the meaning of Section 2(11) of the Act.

Secondary Indicia of Supervisory Authority

Secondary indicia of supervisory authority may be relied on only in otherwise close cases where some evidence indicates the existence of primary indicia. See GRB Entertainment, 331 NLRB 320 (2000); Billows Electric Supply, 311 NLRB 878 fn. 2 (1993). Among the secondary indicia of supervisor status argued by the Employer here are employee-supervisor ratio, pay differentials, and attendance at supervisor meetings. In this case there is evidence of secondary indicia that strongly support the contention that the foremen/operators are statutory supervisors.

With respect to pay, the record establishes that putative supervisor Luis Garcia earns \$19.75 per hour, and that upon becoming a foreman the pay of putative supervisor Santos Quintanilla increased from \$7.30 per hour to \$13.10 per hour.²¹ Michael Duong testified that

²¹ There is no evidence in the record as to whether foremen earn overtime in the event they work in excess of 40 hours per week.

foremen generally earn over \$13 per hour, although he did not recall the exact amounts.²² There is no evidence to contradict the Employer's position that the foremen's wages per hour are approximately double those earned by sorters working on the production line. See Essbar Equipment Company, 315 NLRB 461 (1994) (individual found to be supervisor who earned \$12 per hour while directing junior employees who earned \$7 per hour); Donaldson Bros. Ready Mix, Inc., 341 NLRB No. 124, slip op. at 5 (2004) (foreman earning \$14.50 per hour while other two employees earned \$11.50 and \$9.50 per hour found to be statutory supervisor).²³

Here, in the event the foremen are not found to be supervisors, the ratio of employees to supervisors also merits consideration. If the foremen are found not to be supervisors,²⁴ then the 60 to 80 employees at 10th Street would be supervised by Collins alone and the 68 to 80 employees at Wood Street would be supervised by Douglas Duong alone. See Formco, Inc., 245 NLRB 127, 128 (1979) (finding supervisory status where ratio of employees to supervisor would otherwise be 70 to 1). I also note that if the foremen are found not to be supervisors, then there would be no supervisor present between 5:30 a.m. and 10:00 a.m. or between approximately 7:00 p.m. and 11:00 p.m. at the 10th Street facility and there is no supervisor present at the port facility.²⁵

²² There are also leads at the facilities, who make approximately one dollar per hour more than the sorters on the sorting line, but who earn substantially less than the foremen and who are at least nominally subject to the supervision of the foremen.

²³ The testimony in Donaldson Bros. that President Charles Donaldson sought to give foreman Vernon Weidow leeway to make his own decisions without micromanaging Weidow's work (341 NLRB No. 124, slip op. at 13-14) is similar to the record testimony of Collins that he is frequently irritated when foremen double check with him on matters which he feels they should already understand are well within their supervisory authority to decide independently).

²⁴ No party contends that the leadmen who receive one dollar more per hour than line workers are statutory supervisors.

²⁵ I further note that in many of the cases where the Board has refrained from finding that the highest ranking individual at a certain time constitutes a supervisor, the Board has relied in part upon the around the clock availability of one or more higher level supervisors by telephone, pager or otherwise. See, e.g., Ryder Truck Rental, 326 NLRB 1386, 1387 n. 8 (1998); Beverly Enterprises v. NLRB, 148 F.3d 1042, 1048 (8th Cir. 1998). In the present case, by contrast, there is no indication that Collins, Douglas Duong or Michael Duong are able to be reached at those times when they are not at their respective facilities and the foremen are the highest ranking

Although I find that the pay disparity and employee to supervisor ratios are secondary indicia that support my finding of supervisory status, I find that the evidence with respect to foreman attendance at supervisory meetings is inconclusive, and I do not rely on the Employer's assertion that the attendance of foremen at supervisory meetings supports a conclusion of supervisory status in this case. While the frequency of such meetings and the required attendance of the foremen are evident, there is little evidence as to the subject matter of such meetings, and in fact Quintanilla denied that personnel matters were discussed at such meetings. It is therefore equally probable that the presence of foremen at such meetings was not related to any supervisory authority on their part but was merely necessary in order for the foremen to understand the Employer's operational needs. See, e.g., High Point Construction Group, LLC, 342 NLRB No. 36, slip op. at 7 (2004); Tri-City Motor Company, Inc. d/b/a Auto West Toyota, 284 NLRB 659, 661 (1987) (attendance at supervisory meetings not material where no evidence that personnel matters were discussed at such meetings); Jordan Marsh Stores Corp., 317 NLRB 460, 467 (1995) (nominal supervisor found not to be statutory supervisor where record did not reflect subjects discussed at supervisor meetings).

In sum, I conclude that the secondary indicia of supervisory authority relied upon above, considered together, further bolster the conclusion that the foremen are supervisors within the meaning of Section 2(11) of the Act.

employees present. The above-referenced example wherein Quintanilla waited until the next day to inform Douglas Duong about the tractor accident the previous night implicitly suggests that the higher level plant managers are not reachable.

CONCLUSIONS

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Upon the entire record in this proceeding, I conclude that:

Upon the entire record in this proceeding, including the parties' arguments made at the hearing and the brief filed by the Employer, I find:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The parties stipulated, and I find, that the Employer is a California corporation with an office and place of business located at 1820 10th Street in Oakland, California, where it is engaged in the business of solid waste disposal, recycling, and solid waste transfer. During the past 12 months, the Employer earned gross revenues in excess of \$500,000 and purchased and received products, goods and materials valued in excess of \$5,000 directly from businesses located outside the State of California. In such circumstances, I find the assertion of jurisdiction appropriate herein.

3. The parties stipulated, and I find, that the Petitioner is a labor organization within the meaning of the Act.

4. The Petitioner claims to represent certain individuals employed by the Employer, who are supervisors within the meaning of the Act. Therefore, no question affecting commerce exists concerning the representation of these individuals of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. For all of the reasons stated above, the petition is hereby dismissed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST on **December 27, 2004**. The request may **not** be filed by facsimile.

Dated: December 10, 2004

Alan B. Reichard, Regional Director
National Labor Relations Board
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